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Problems in Probate Law, Including a Model Probate Code (Book Review)

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Rhyne's work, inasmuch as he did not set out to analyze policy as much as synthesize principle, still it is to be regretted that his excellent technique and varied experience were not applied also to the policy considerations. Especially in such a growing field, it is imperative that policy values be kept in mind, lest the trend of decision stagnate rather than stimulate the advance of legal doctrine and thus place it out of touch with technological and economic needs.

As the first treatise on aviation accident law, this volume, by providing handy reference to decisions, statutes, and conventions, makes an important contribution to legal thought in aviation. As Senator McCarran, a leading legislative figure in the aviation world, remarks in the foreword,[1] ". . . while many cases must yet be decided to develop aviation accident law to the status of the law applicable to older modes of transportation, the author has given lawyers an invaluable tool with which to work in developing this field of aviation law."

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PROBLEMS IN PROBATE LAW, INCLUDING A MODEL PROBATE CODE. By The Model Probate Committee of the American Bar Association. Chicago: Callaghan and Co., 1946. Pp. li, 756, index. $10.00.

The title of this book indicates the method of its compilation and the effort and learning which has been spent upon the undertaking. Clearly, this work was done in a spirit of altruism, as a public service, and not for private gain.

The book is not a *necessary* tool in the working library of the average practicing attorney. It makes no pretense in that direction. But for the student, lawyer, or legislator interested in probate work, and the improvement of probate systems, the publication should prove of value and inspiration.

In recent years, many of the states have revised their probate codes and other states are seeking to improve their methods of administering estates of decedents. Recognizing these facts, the authors of the "Model Probate Code" speak of their handiwork as follows:[1a]

> "This is a model code, not a uniform act. Its objective is not the attainment of uniformity among the several states, but the improvement of probate procedure wherever revision of probate legislation is sought. Primarily, it is intended as a reservoir of ideas, and of acceptable legislative formulations of those ideas, from which legislative committees may draw the framework of new probate codes."

The draftsmen of the "Model Probate Code" have incorporated therein, so far as is germane, all or parts of the Uniform or Model Acts prepared by

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[1] P. X.
[1a] P. 10.

the National Conference of Commissioners on Uniform State Laws of the American Bar Association.

We are told that as it becomes advisable, other relevant uniform legislation will be incorporated in the "Model Probate Code."

The framers of the "Model Probate Code" contemplated a probate court "which is an integral part of the judicial organization of the state." Legislators are warned to adapt the Model Code to local conditions, and to be alert for constitutional questions.

The work contains constructive comments, suggestions for alternative statutory provisions, etc. The "Model Probate Code" not only embraces the usual matters contained in probate codes; it also attempts to make improvements.

The work embraces 756 pages of pithy legal writing, representing "five years of preparation and unremitting toil" by a large number of the best trained, most learned and experienced "probate-minded" lawyers in the country. Any reviewer would indeed be presumptive here to attempt a detailed, analytical criticism of this book. Suffice it to give the reader just a few illustrations on how the framers of the Code evolved provisions somewhat at variance with New York practice.

The Model Code permits probate and the appointment of an executor or a general administrator without requiring notice to interested parties.[2] But "if no notice is given prior to the appointment of the personal representative, notice must be given as soon as the appointment is made and interested persons then have an opportunity to have all matters reheard which were passed upon prior to the notice." [3]

It is claimed that, "The advantage of the appointment of executor or general administrator without notice is that some one may take charge of the estate and preserve it as soon as the decedent dies. There is no delay for the giving of notice, nor is there the additional expense of a special administratorship. However, under this Code, a court or an interested person may always require notice; or a court could adopt a rule requiring notice in all cases. Notice is required, however, in the case of guardianship estates." [4]

Under the New York Surrogate's Court Act, notice to interested persons must be given *before* letters may issue. Where emergency or necessity therefor is shown, a New York surrogate, in his discretion, may appoint a temporary administrator to secure and safeguard the assets of the estate prior to the appointment of a permanent representative. The temporary administrator will be given the authority needed to perform his duties. In an emergency, the surrogate may appoint such representative without notice.[5]

It is believed that the New York rule of insuring the selection of the proper representative by giving interested persons a chance to be heard *before* his appointment is preferable, at least in metropolitan areas.

Under the "Model Probate Code" [6] if a man dies intestate leaving a wife and issue, the wife gets one-half of the net estate, and the issue get the residue;

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[2] MODEL PROBATE CODE § 68.
[3] MODEL PROBATE CODE § 70.
[4] P. 16.
[5] N. Y. SURROGATE COURT ACT § 126.
[6] MODEL PROBATE CODE § 22.

whereas under Section 83, New York Decedent Estate Law, the division would be one-third to the wife and two-thirds to the issue.

Under the Model Code, if the issue are all in the same degree of kinship to the intestate, they take equally, or if unequal degree, then those of more remote degrees take by representation. In New York, issue take *per stirpes.*

Determining distribution under the Model Code, in cases where the takers are in unequal degrees of kinship with respect to the intestate, is done as follows:

Suppose *A* dies, leaving surviving a father *B,* a brother *C,* two children of another deceased brother *D,* and three children of a deceased sister *E.*

The net estate would be divided into four (4) equal shares (that is, the number of shares would be the sum of the number of living persons who are in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the intestate, but who left issue surviving. Under the Model Code each living parent is treated as of the same degree as a brother or sister. So in the above illustration, we take one share each for *B, C, D* and *E. B* and *D* each take 1/4th of the net estate. *D's* two children each take 1/8th. *E's* three children each get 1/12th.

Under New York law the same estate would all go to *B,* the intestate's father. None of the others would receive anything.[7]

In laying down rules for descent and distribution on intestacy, no rule can fit and do justice in every case. The legislature must attempt to lay down rules which it deems will accomplish the most good for the most people in the ordinary situations.

Suppose in the case above given, the father was affluent, but niggardly to a degree, while the survivors were worthy but indigent people. The rule of the Model Probate Court would be more just than the New York rule in such case.

Supposing, on the other hand, that the father were poverty stricken, while the other relatives were in good circumstances, stingy and not inclined to help the father. Manifestly, the New York rule would be the better one to follow.

As the authors so well say:

> "It is, of course, recognized that any scheme of intestate succession is to some extent arbitrary. It should in the main express what the typical intestate would have wished had he expressed his desires in the form of a will or otherwise. . . . This is a highly speculative matter and legislators may deem it desirable to modify the scheme herein set out." [8]

One could comb through the Model Probate Code, sift out and similarly discuss many more items; but such a course seems inappropriate at the moment. Many matters have purposely been omitted from the Model Code, for various reasons, such as, for example, the impossibility of laying down hard and fast rules which would work justly and effectively, etc.

The appendices contain valuable statutory notes.

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[7] N. Y. DECEDENT ESTATE LAW § 83(3).
[8] P. 63.

The monographs, by Prof. Simes and Mr. Basye, are scholarly and worth careful reading.

To the Model Probate Code Committee of the American Bar Association the research staff of the University of Michigan, Prof. Simes, Mr. Basye and all those who collaborated in this work, the public and the legal profession owe their thanks and gratitude for a great public service, painstakingly and cheerfully rendered, and fruitfully concluded.

WARREN J. BLOOM.*

THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES. Edited by George Warren. New York University School of Law: New York, 1947. Pp. viii, 630, index.

The Federal Administrative Procedure Act and the Administrative Agencies (with notes and Institute Proceedings) is a volume designed to recapture, and permanently to record the accomplishment of an Institute held by the New York University School of Law, in association with the Division of General Education. This Institute was planned "for the purpose of informing the bar of the profound changes that have been made and are being made in the administrative process of the Federal Government. The Institute was designed to give an opportunity to government personnel, attorneys at law, and the faculties of law schools to hear outstanding experts discuss the Act and describe its application to the more important federal administrative agencies." [1] The book is of great service to those who were not fortunate enough to attend the Institute, but are vitally interested in the Federal Administrative Procedure Act, and its implementation by the federal agencies affected.

Dean Vanderbilt's direct contribution to this volume consists of an enlightening Foreword,[2] an interesting treatment of the "Legislative Background of the Federal Administratrive Procedure Act," [3] and participation in the discussion periods that followed most of the addresses.

Whether the Federal Administrative Procedure Act is deemed to be the most important statute passed by Congress since the enactment of the Judiciary Act of 1789, or merely another important enactment, it is perfectly true that the Act represents a monumental charter in the field of administrative law.[4]

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[1] P. v (Foreword by Arthur T. Vanderbilt, Dean, New York University School of Law).

[2] Pp. iii-v.

[3] Pp. 1-50. *See* Dean Vanderbilt's, *One Hundred Years of Administrative Law,* I LAW, A CENTURY OF PROGRESS, 1835-1935, 117-144, for a review of the development of Administrative Law.

[4] *The Federal "Administrative Procedure Act" Becomes Law,* 32 A. B. A. J. 377 (1946); "One of the really important events in the development of administrative law in the United States has been the recent enactment by